

**UNITED STATES COURT OF APPEALS**  
**FOR THE TENTH CIRCUIT**

**JUL 15 2004**

**PATRICK FISHER**  
Clerk

ANGELA MICHELE VALDIVIA,

Plaintiff-Appellant,

v.

OFFICER OROSCO; KRISTINA  
KESSLER, MRT; MARYANNE  
ALESSI, PA; JANE CARVER, RN III,

Defendants-Appellees.

No. 03-1249  
(D.C. No. 00-S-592 (CBS))  
(D. Colo.)

**ORDER AND JUDGMENT \***

Before **KELLY** , Circuit Judge, **BRORBY** , Senior Circuit Judge, and **BRISCOE** ,  
Circuit Judge.

After examining the briefs and appellate record, this panel has determined  
unanimously that oral argument would not materially assist the determination of  
this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is  
therefore ordered submitted without oral argument.

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\* This order and judgment is not binding precedent, except under the  
doctrines of law of the case, res judicata, and collateral estoppel. The court  
generally disfavors the citation of orders and judgments; nevertheless, an order  
and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Angela Valdivia, appearing pro se, appeals from summary judgment granted in favor of defendants on her civil rights suit, brought under 42 U.S.C. § 1983, in which she alleges violation of the Eighth Amendment. Ms. Valdivia complains that the district court improperly granted summary judgment without giving her a chance to respond because she did not receive notice of the magistrate judge's report and recommendation. Concluding that Ms. Valdivia's notice of appeal was not timely filed, we dismiss the appeal.

Summary judgment was granted on February 25, 2003. The court construed a letter from Ms. Valdivia, in which she alleged failure to receive the magistrate judge's report and recommendation, as a motion for reconsideration, and denied that motion on March 17, 2003. Ms. Valdivia therefore had thirty days from March 17 to file a notice of appeal. Fed. R. App. P. 4(a)(4)(A). Instead, Ms. Valdivia filed a motion objecting to the denial of reconsideration, which the court denied on April 29. Such a motion is unauthorized by the rules of civil procedure and had no effect on the running of the appeal time. Ms. Valdivia did not file her notice of appeal until May 29. "[S]ince the taking of an appeal within the prescribed time is mandatory and jurisdictional," we are without jurisdiction to review the decision on the merits. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); and *cf. Jenkins v. Burtzloff*, 69 F.3d 460, 464 (10th Cir. 1995) (dismissing prisoner pro se appeal for failure to timely file notice of appeal).

The appeal is DISMISSED. The motion to proceed *in forma pauperis* has been granted; and Ms. Valdivia shall continue making payments toward her filing fees until the entire balance is paid in full.

Entered for the Court

Paul J. Kelly, Jr.  
Circuit Judge